Supreme Court, U.S.
FILED
JAN 13 1997
CLERK

No. 96-950

In The

Supreme Court of the United States

October Term, 1996

MICAELINA ORTIZ,

Petitioner,

vs.

JOHN O. BUTLER COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL D. SHER
Counsel of Record
HARVEY M. ADELSTEIN
EUGENE A. BOYLE
NEAL, GERBER & EISENBERG
Attorneys for Respondent
Two North LaSalle Street
Chicago, Illinois 60602
(312) 269-8000

70318 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

QUESTIONS PRESENTED

1. Did the Court of Appeals properly affirm the District Court's dismissal of petitioner's retaliatory discharge claim because the claim was moot, petitioner having already received all of the requested relief to which she was legally entitled?

2. Separate and apart from the mootness of petitioner's claim, might that claim have been dismissed on the alternative ground that no genuine issue of material fact existed with respect to respondent's legitimate, non-retaliatory reason for terminating petitioner's employment?

LIST OF INTERESTED PARTIES

The petitioner is Micaelina Ortiz. The caption incorrectly spells petitioner's name as "Michaelina Ortiz."

The respondent is correctly identified in the caption as John O. Butler Company. The parent corporation of respondent is Sunstar, Inc. The respondent has no interest in any non-wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Interested Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	3
Reasons for Denying the Writ	4
I. The District Court properly dismissed Ortiz's retaliatory discharge claim because it was moot, Ortiz having received all of the requested relief to which she was legally entitled, the Court of Appeals correctly affirmed that determination, and there is no reason for this Court's review of that decision.	4
II. The District Court's judgment might also have been affirmed on the alternative ground that because Ortiz was not a victim of intentional discrimination, summary judgment should have been entered against her on her claim of retaliatory discharge.	8

Contents

Page

Conclusion 11

TABLE OF CITATIONS

Cases Cited:

Cox v. Phelps Dodge Corp., 43 F.3d 1345 (10th Cir. 1994) 6

Cushing v. City of Chicago, 3 F.3d 1156 (7th Cir. 1993) 8

Dale v. Chicago Tribune Co., 797 F.2d 458 (7th Cir. 1986) 9

Gehring v. Case Corp., 43 F.3d 340 (7th Cir. 1994) .. 9, 10

Hamann v. Gates Chevrolet, Inc., 910 F.2d 1417 (7th Cir. 1990) 9, 10

Harrison v. United Mine Workers of America, 941 F.2d 1190 (11th Cir. 1991) 6

Klein v. Trustees of Indiana University, 766 F.2d 275 (7th Cir. 1985) 10

Morgan v. Harris Trust & Savings Bank of Chicago, 867 F.2d 1023 (7th Cir. 1989) 10

Palda v. General Dynamics Corp., 47 F.3d 872 (7th Cir. 1995) 8

Contents

	Page
Powell v. McCormack, 395 U.S. 486 (1969)	5
Powers v. Dole, 782 F.2d 689 (7th Cir. 1986)	10
Rucker v. Higher Educational Aids Board, 669 F.2d 1179 (7th Cir. 1982)	9
Statutes Cited:	
28 U.S.C. § 1254(1)	1
29 U.S.C. § 621 *et seq.*	3
42 U.S.C. § 1981a	2
42 U.S.C. § 1981a(b)(1)	6
42 U.S.C. § 2000e *et seq.*	3
42 U.S.C. § 2000e-3	1
Rule Cited:	
Supreme Court Rule 10	7

APPENDIX

Appendix — Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division Decided May 26, 1994 ..... 1a

Respondent requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on September 9, 1996.

OPINIONS BELOW

The unanimous opinion of the Court of Appeals is reported at 94 F.3d 1121. The memorandum opinion and order of the District Court that was affirmed on appeal is reported at 1995 U.S. Dist. LEXIS 9582 (the "July 6 Opinion"). The District Court's earlier memorandum opinion and order is reported at 1994 U.S. Dist. LEXIS 7149 and is reproduced in the Appendix hereto (the "May 26 Opinion").

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 9, 1996. While petitioner has invoked the jurisdiction of this Court "pursuant to Title VII of the Civil Rights [*sic*] of 1991, 42 U.S.C. Section 2000(e), *et seq.*, and 28 U.S.C. 1291," (petition at 2), this Court's jurisdiction properly is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

> **§ 2000e-3. Other unlawful employment practices.**
>
> (a) **Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.** It shall be an unlawful employment practice for an employer to discriminate against any of his

> employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

United States Code, Title 42:

> **§ 1981a. Damages in cases of intentional discrimination in employment.**
>
> (b) **Compensatory and punitive damages**
>
> (1) **Determination of punitive damages**
>
> A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

STATEMENT OF THE CASE

This action was commenced in 1993 by petitioner, Micaelina Ortiz ("Ortiz"), by her filing of a two-count complaint against respondent, John O. Butler Company ("Butler"). In Count I of her complaint, Ortiz alleged that Butler violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* ("Title VII"), by terminating her employment because she made complaints about the hostile and discriminatory working conditions which she alleged existed at Butler. In Count II, Ortiz alleged, alternatively, that Butler discharged her due to her age, in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.* ("ADEA").

Butler moved for summary judgment on both counts of the complaint and, on May 26, 1994, the District Court granted Butler's motion as to Count II (the ADEA claim), but denied the motion as to Count I (the Title VII retaliatory discharge claim). (Resp. App. at 13a-14a.) Butler thereafter filed a motion to reconsider the denial of summary judgment as to Count I, which motion was denied. With leave of court, Butler thereafter filed an amended motion for reconsideration which was also denied.

After the final pretrial order was entered by the court, Butler filed its motion for summary judgment based on the mootness of Ortiz's claim. On July 6, 1995, the District Court issued its memorandum opinion and order granting this motion. 1995 U.S. Dist. LEXIS 9582. The memorandum opinion and order were entered on the docket on July 10, 1995, and final judgment was entered on July 21, 1995. This judgment was affirmed by the Court of Appeals for the Seventh Circuit in its decision rendered September 9, 1996. 94 F.3d 1121.

Regarding the facts of this case and additional proceedings in the courts below, Butler incorporates by reference herein the statement of the facts found in the decision of the Court of Appeals, 94 F.3d at 1123-1124.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT PROPERLY DISMISSED ORTIZ'S RETALIATORY DISCHARGE CLAIM BECAUSE IT WAS MOOT, ORTIZ HAVING RECEIVED ALL OF THE REQUESTED RELIEF TO WHICH SHE WAS LEGALLY ENTITLED, THE COURT OF APPEALS CORRECTLY AFFIRMED THAT DETERMINATION, AND THERE IS NO REASON FOR THIS COURT'S REVIEW OF THAT DECISION.

The petition presents no reason, compelling or otherwise, for the review on a writ of certiorari of the decision of the Seventh Circuit. The District Court properly granted summary judgment in Butler's favor because the claim asserted in Count I of Ortiz's complaint had become moot, Ortiz having received all relief to which she was entitled. Pursuant to the settlement of her NLRB charge, Ortiz had received an amount in excess of the lost wages and benefits sought to be recovered, and she failed to identify any other recoverable damages in her damage statement which she submitted and which was incorporated in the final pretrial order, or to indicate that she was seeking any other cognizable relief. She had no possibility of receiving a tangible benefit from proceeding to trial and, therefore, Count I was properly dismissed. As recognized by the Court of Appeals, Ortiz waived the argument that she should have been allowed to proceed to trial because she may have been able to recover compensatory damages other than those set forth in her damage statement,

because she failed to raise this argument in the District Court. Moreover, any unresolved issue regarding an award of statutory attorneys' fees, standing alone, could not create the case or controversy required for the proper exercise of the District Court's jurisdiction. Finally, the stipulated facts of record established as a matter of law that Ortiz was not entitled to an award of punitive damages.

Ortiz's supplemental damage statement to the final pretrial order identified, and quantified, three categories of damages: (1) lost wages and benefits, which were offset by the NLRB settlement; (2) "increased burden of proof" damages in the amount of $100,000; and (3) punitive damages of $300,000. 94 F.3d at 1123-24.

The District Court's grant of summary judgment in favor of Butler was grounded on its finding "that Ortiz's claim was moot because, even if she prevailed, she would not be entitled to any damages," and the Seventh Circuit applied the proper standard of review in affirming this judgment:

> If the non-moving party fails to establish the existence of an element essential to his case, one on which he would bear the burden of proof at trial, summary judgment must be granted to the moving party.

94 F.3d at 1124.

Since a federal court's subject matter jurisdiction extends only to actual cases and controversies, *Powell v. McCormack*, 395 U.S. 486, 496 n.7 (1969), the district court is without jurisdiction "where a plaintiff has received all of the requested relief to which she is legally entitled, [because] there is no longer the requisite case or controversy. . . ." 94 F.3d at 1125, citing

Cox v. Phelps Dodge Corp., 43 F.3d 1345, 1348 (10th Cir. 1994), and *Harrison v. United Mine Workers of America*, 941 F.2d 1190, 1193 (11th Cir. 1991). Because Ortiz abandoned in the Court of Appeals her contention that she was entitled to damages relating to her "increased burden of proof" theory, the only remaining questions before the Court of Appeals were "whether she was potentially entitled to any additional compensatory damages or to any punitive damages." 94 F.3d at 1126.

The Court of Appeals correctly concluded that Ortiz's arguments relating to compensatory damages were waived because she failed to raise them in the District Court, advancing them for the first time on appeal, *id.*, and that, as a matter of law, Ortiz was "unable to show that there is a genuine issue of material fact that she would be entitled to punitive damages." *Id.* To recover punitive damages, Ortiz was required to demonstrate that Butler engaged in a discriminatory practice "with malice or with reckless indifference to the federally protected rights of [Ortiz]." 42 U.S.C. §1981a(b)(1); 94 F.3d at 1126. The Seventh Circuit concurred with the conclusion of the District Court that Ortiz "failed to present any evidence that Butler terminated her employment with malice or reckless indifference to her protected rights. . . ." *Id.* Indeed, among the uncontested facts in the District Court record was this one regarding Butler's reason for terminating Ortiz:

> Plaintiff was first suspended and later discharged because Defendant believed that Plaintiff had intentionally and maliciously filed baseless charges against her supervisors and Plaintiff refused to admit that she had falsely accused her supervisors of sexual harassment.

Id., quoting from the District Court record.

Ortiz failed to adduce any evidence or present any genuine issue of material fact regarding any possible entitlement to punitive damages; the undisputed evidence as to Butler's intent, including the foregoing uncontested fact, "can only support the inference that Butler fired her because it sincerely believed she had intentionally asserted baseless charges," 94 F.3d at 1127, and therefore did not act with the requisite malice or reckless indifference. Ortiz presented no evidence impugning the fairness of the investigation and interviewing process conducted by Butler's management in response to the charges in the two anonymous letters. *Id.*

The writ should be denied for any and all of the following reasons: (1) this case presents no conflict of decisions among the federal circuits or with any decision of this Court; (2) the decision of the Court of Appeals was properly decided; (3) the decision of the Court of Appeals turns on its own facts — that is, Ortiz was terminated based upon the undisputed fact that she was first suspended and later discharged because Butler believed she "had intentionally and maliciously filed baseless charges against her supervisors" and acted on this belief in discharging Ortiz; and (4) the presence of other meritorious arguments, as discussed in Part II below, which demonstrate that the decision of the Seventh Circuit is correct without regard for the Questions Presented for Review in Ortiz's petition, which makes it unnecessary to reach those questions raised by the petition. There is no consideration, as identified by Rule 10 of the Rules of this Court, which supports the granting of the petition. The Court of Appeals fully considered and correctly decided the case, and the issues presented by the petition do not warrant review by this Court.

II.

THE DISTRICT COURT'S JUDGMENT MIGHT ALSO HAVE BEEN AFFIRMED ON THE ALTERNATIVE GROUND THAT BECAUSE ORTIZ WAS NOT A VICTIM OF INTENTIONAL DISCRIMINATION, SUMMARY JUDGMENT SHOULD HAVE BEEN ENTERED AGAINST HER ON HER CLAIM OF RETALIATORY DISCHARGE.

At a pretrial conference held on March 7, 1995, the date on which the final pretrial order was entered, the District Court granted Butler leave to file a motion for reconsideration of its original motion for summary judgment in light of certain new authority not previously cited by the parties. While this second amended motion for reconsideration was pending, Butler filed the motion for summary judgment based on the mootness of Ortiz's claim, which the District Court granted on July 6, 1995, and which the Seventh Circuit affirmed. The dismissal of Count I of the complaint may have been affirmed on the alternative ground that there was no genuine issue of material fact with respect to Butler's legitimate, non-retaliatory reason for terminating Ortiz's employment. Therefore, the decision of the Court of Appeals is correct without regard for the questions sought to be raised by the petition.

A district court's decision to dismiss an action may properly be affirmed on any adequate ground appearing in the record, even if the district court did not rely on such ground. *Palda v. General Dynamics Corp.*, 47 F.3d 872, 875 n. 2 (7th Cir. 1995); *Cushing v. City of Chicago*, 3 F.3d 1156, 1167 (7th Cir. 1993). Butler's second amended motion for reconsideration (R.57) was pending at the time the District Court issued its July 6 Opinion, and summary judgment also could have been entered for the reasons stated in Butler's second amended motion for reconsideration.

To determine whether an employer has intentionally discriminated in violation of ADEA or Title VII, the employer's motive or intent must be determined — that is, it must be determined "whether the plaintiff is a victim of intentional discrimination." *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994); *see also Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986); *Hamann v. Gates Chevrolet, Inc.*, 910 F.2d 1417, 1420 (7th Cir. 1990). Since in granting summary judgment in favor of Butler on Count II (the ADEA claim) the District Court found that the motive of Butler's decision-makers was legitimate and not a pretext for discrimination, that finding also would support the entry of judgment in favor of Butler on Ortiz's retaliatory discharge claim, asserted in Count I.

The District Court correctly concluded that Butler's decision-makers believed that Ortiz had engaged in conduct which is not protected opposition activity under Title VII, and acted on that belief:

> The evidence in this case clearly shows that plaintiff was first suspended and later discharged because the defendant believed that she had intentionally and maliciously filed baseless charges against her supervisors and plaintiff refused to admit that she had falsely accused her supervisors of sexual harassment.

(May 26 Opinion, Resp. App. at 13a.) The District Court recognized that "the filing of utterly baseless charges" of discrimination is not protected opposition activity (*id.*, Resp. App. at 6a), citing *Rucker v. Higher Educational Aids Board*, 669 F.2d 1179, 1182 (7th Cir. 1982), and concluded that Butler actually believed that Ortiz in fact had engaged in such unprotected activity and acted upon this belief in first suspending and later terminating her.

This unchallenged finding (to which Ortiz stipulated in the final pretrial order) would preclude any determination that Ortiz's termination was motivated by a discriminatory intent or that Ortiz was "a victim of intentional discrimination." *Gehring, supra*, 43 F.3d at 343. On the contrary, this finding should compel the conclusion that Butler fired Ortiz because it believed she had engaged in conduct in which she had no right to engage and which was destructive to the company's welfare. The underlying beliefs and reasons supporting the decision to terminate Ortiz are the same for Count I as for Count II; whether the claim asserted is one for violation of ADEA or retaliatory discharge, Butler's reasons for terminating Ortiz are identical.

Where, as in this case, the reasons for Butler's decision to terminate Ortiz were determined as a matter of law — based upon facts to which Ortiz stipulated — Butler was entitled to judgment on Ortiz's retaliatory discharge claim for the additional reason that the record clearly established that her termination was not the product of an impermissible retaliatory intent. Where there is no triable issue of fact, motive and intent may be determined as a matter of summary judgment. *Hamann v. Gates Chevrolet, Inc.*, 910 F.2d 1417, 1420 (7th Cir. 1990); *Morgan v. Harris Trust & Savings Bank of Chicago*, 867 F.2d 1023, 1026 (7th Cir. 1989); *Powers v. Dole*, 782 F.2d 689, 694 (7th Cir. 1986). Because Ortiz failed to make any showing that her employment was terminated because of an impermissible discriminatory intent, summary judgment properly may have been entered by the District Court against Ortiz on Count I of her complaint on this ground as well. Because Ortiz "failed to produce any evidence raising a material issue of fact as to whether the defendants' *[sic]* proffered reason for its employment decision was pretextual," *Klein v. Trustees of Indiana University*, 766 F.2d 275, 283 (7th Cir. 1985), Butler was entitled to summary judgment on Count I of the complaint, apart from the mootness of that claim.

CONCLUSION

For the reasons stated, Ortiz's petition for a writ of certiorari to review the judgment and opinion of the Seventh Circuit should be denied.

Respectfully submitted,

MICHAEL D. SHER
Counsel of Record
HARVEY M. ADELSTEIN
EUGENE A. BOYLE
NEAL, GERBER & EISENBERG
Attorneys for Respondent
Two North LaSalle Street
Chicago, Illinois 60602
(312) 269-8000

APPENDIX — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DECIDED MAY 26, 1994

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 93 C 1123

1994 U.S. Dist. LEXIS 7149

May 26, 1994, Decided
May 27, 1994, Docketed

MICAELINA ORTIZ,

Plaintiff,

v.

JOHN O. BUTLER COMPANY,

Defendant.

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

Plaintiff Micaelina Ortiz filed a complaint against defendant John O. Butler Company ("Butler") alleging retaliatory discharge in violation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 ("Title VII"), 42 U.S.C. § 2000(e) et seq. (Count I), and termination in violation of the

Appendix

Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 et seq. (Count II). Defendant Butler has filed a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56.[1] For the reasons stated below, defendant's motion for summary judgment is denied as to Count I and granted as to Count II.

BACKGROUND

Defendant Butler is a manufacturer and distributor of oral hygiene products. Plaintiff was employed at Butler from February 17, 1982, until she was terminated on April 6, 1992. Plaintiff claims that she was terminated in retaliation for complaints she made about the working conditions at Butler and because of her age. Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission and received a right to sue letter on November 30, 1992.[2]

Plaintiff alleges that during her tenure at Butler she was exposed to a hostile work environment. Plaintiff alleges that she was sexually harassed by her immediate supervisor, Frank Williams. Plaintiff claims that her supervisor continuously made lewd remarks to her such as "Hello beautiful legs, when are we going out" or "when are you going to let me come to your apartment." In addition, plaintiff alleges that her group leader,

---

1. Defendant has also filed a motion to strike portions of the affidavits of both plaintiff and Marie Robles, a former employee of Butler, arguing that certain statements are hearsay or based on speculation. The court finds that defendant's motion to strike is moot because plaintiff has filed amended affidavits curing the problems that defendant raised in its motion.

2. See Complaint, Exhibit A.

Earl Phillips, would intimidate workers through the use of foul, intimidating language, derogatory ethnic remarks, name calling and threats.

Plaintiff alleges that she, along with other Butler employees, asked both Williams and the President of Butler to meet with them to discuss and remedy their allegedly hostile and unsatisfactory working conditions, but their requests were denied. After these requests were denied, plaintiff alleges that two anonymous letters were submitted to management complaining about the working conditions at Butler. The second letter accused Earl Phillips of "always getting fresh with the girls verbally and manually," and accused the Molding Department's Supervisor, Frank Williams of knowing about Phillips's behavior but doing nothing and himself of being "fresh with us verbally."[3]

In response to these letters, Butler management decided that the company should conduct an audit of the Molding Department personnel to investigate the complaints made in the two letters. The audit consisted of Susan Bondy, Director of Human Resources, conducting individual employee interviews during which the interviewer would ask questions about the employee's work environment.

At plaintiff's first interview, plaintiff stated that she had not heard anyone in management use foul language or make sexual comments. At a later interview, plaintiff denied that she was involved in the drafting of either of the two letters complaining about the working condition at Butler. In addition,

---

3. See Statement of Unidisputed Material Facts, Exhibit B.

at plaintiff's deposition she again denied being involved in the drafting of either letter. Plaintiff, however, now admits in an affidavit filed with the court in response to defendant's motion for summary judgment to having participating [sic] in the drafting of the second letter. Plaintiff states that she lied at her interview and deposition about her involvement in the drafting of the second letter because she was physically afraid of Mr. Phillips and was worried about being fired if she confessed her role.[4]

After the audit was completed, Butler accused plaintiff of intentionally and maliciously creating and disseminating false claims of sexual harassment. Defendant suspended all the employees believed to be involved in the alleged creation of the falsehoods except for plaintiff, who was terminated on April 6, 1992. Plaintiff, who was forty-four at the time of her termination, claims the reason she was terminated, while other younger employees accused of the same conduct were merely suspended and demoted, was because of her age.

ANALYSIS

Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is inappropriate when there is a dispute over facts which might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). In ruling on a motion for summary judgment the evidence of the non-movant must be

---

4. See Ortiz Affidavit, PP 12, 20-26.

believed, and all justifiable inferences must be drawn in the non-movant's favor. Id. at 2513. This court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial.

However, when a party bears the burden of proof on an issue, that party may not simply rest on its pleadings to defeat summary judgment, but must affirmatively demonstrate with specific factual allegations that a genuine issue of material fact exists and requires a trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). The party must do more than simply "show there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L.Ed. 2d 538 (1986) (footnote omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " Id.

I. Retaliatory Discharge Claim

Plaintiff claims that she was terminated in retaliation for complaints she made about the allegedly hostile and unsatisfactory working conditions at Butler in violation of Title VII. Title VII provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter.

42 U.S.C. § 2000e-3(a). The Seventh Circuit applies the burden-

shifting sexual discrimination analysis to retaliatory discharge claims. See Samuelson v. Durkee/French/Airwick, 976 F.2d 1111, 1114 (7th Cir. 1992). Under the burden-shifting formula, the plaintiff bears the initial burden of establishing a prima facie case of retaliatory discharge. Id. at 1113. Once the plaintiff meets that burden, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employee's discharge. If the employer is able to articulate a non-discriminatory reason for plaintiff's discharge, the burden shifts back to the employee to show that the employer's reasons are merely a pretext for retaliatory discharge. Id. at 1114.

To establish a prima facie case of retaliatory discharge in violation of Title VII, plaintiff must show that: (1) she engaged in statutorily protected opposition; (2) she suffered adverse action by Butler; and (3) there is a causal link between her opposition and the adverse employment action. See Samuelson, 976 F.2d at 1114-15 (citing Collins v. Illinois, 830 F.2d 692, 702 (7th Cir. 1987)). In order for the plaintiff's expression to be statutorily protected, the practice that plaintiff is challenging need not actually violate Title VII. "Instead, it is sufficient if the plaintiff has a reasonable belief that she is challenging conduct in violation of Title VII." Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307, 1314 (7th Cir. 1989) (citations omitted).

The Seventh Circuit has held that it is a violation of 42 U.S.C. § 2000e-3(a) to fire an employee because she opposed discrimination even if she was mistaken and there was in fact no discriminatory conduct. Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1182 (7th Cir. 1982).

> The mistake must, of course, be a sincere one; and presumably it must be reasonable . . . for

> it seems unlikely that the framers of Title VII would have wanted to encourage the filing of utterly baseless charges by preventing employers from disciplining the employees who made them. But it is good faith and reasonableness, not he fact of discrimination, that is the critical inquiry in a retaliation case.

Id.

In this case, the evidence shows that plaintiff was first suspended and then later terminated, at least in part, because the defendant believed that she had intentionally and maliciously filed baseless charges against her supervisors.[5] Defendant argues, however, in support of its motion for summary judgment that because plaintiff insisted both during the audit and in her deposition that she did not write or disseminate the letters at issue in this case, plaintiff fails to establish the first element of a prima facie case of retaliation — that she engaged in opposition to practices that she reasonably believed violated Title VII.

---

5. See Statement of Undisputed Material Facts, PP 72 - 90 and Exhibit E. Defendant states that because so many other employees identified plaintiff as someone who either had asked them to sign one of the letters describing the allegedly hostile work environment at Butler or who had written one of the letters, Butler management concluded that plaintiff clearly was involved in disseminating what they believed to be false claims regarding Williams and Phillips. Plaintiff was then notified that she was suspended for one day and demoted to a job in the production department with less pay "for making false statements and accusations with malicious intent." In addition, defendant states that plaintiff was later terminated because of her refusal to admit that she had falsely accused Williams and Phillips of sexual harassment and to accept responsibility for her behavior.

Appendix

In Darnell v. Target Stores, 16 F.3d 173, 176 (7th Cir. 1994), the Seventh Circuit held that when a district court is faced with contradicting deposition testimony and affidavit statements from the same person, the conclusory statements in an affidavit cannot create a conflict with plain admissions in deposition testimony. The court went on to state that it is proper for a district court to rely on the deposition testimony and to disregard subsequent, contradictory affidavit statements of a witness on summary judgment because, "inherently depositions carry an increased level of reliability." Id.

In this case, however, even if the court accepts as true plaintiff's deposition testimony that she did not write or disseminate the letters complaining about sexual harassment at Butler, plaintiff is still able to prove a prima facie case of retaliatory discharge because the defendant admits that it believed that plaintiff had complained of sexual harassment and acted on this belief when suspending and terminating plaintiff.

In E.E.O.C. v. Ohio Edison Co., 7 F.3d 541, 543 (6th Cir. 1993), the Sixth Circuit held that § 2000e-3(a) prohibits an employer from discriminating against third-parties, who have not actually engaged in protected activity themselves, in retaliation for a co-employee's protected opposition. The court stated that although the language of § 2000e-3(a) indicates that Congress did not consider the possibility of allowing a retaliation claim by a party who had not engaged in protected opposition, "the very clear intent of Congress would be undermined" if third-party reprisals were tolerated. Id.

The court found that in enacting § 2000e-3(a), "Congress unmistakably intended to ensure that no person would be deterred from exercising his rights under Title VII by the threat of discriminatory retaliation." Id. Because "tolerance of third-party

reprisals would, no less than tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII," the court concluded that the provisions of § 2000e3(a) prohibit third-party reprisals. Id. at 544. The court stated that even though the statute does no [sic] specifically provide for a claim by a third-party who has not opposed discrimination, the majority of courts, including the Supreme Court, have been willing to construe the sections of Title VII broadly in order not to frustrate the statute's purpose which is to "prevent fear of economic retaliation from inducing employees 'quietly to accept [unlawful] conditions.' " Id. (quoting Mitchell v. Robert DeMario Jewelry, Inc. 361 U.S. 288, 292, 80 S. Ct. 332, 335, 4 L. Ed. 2d 323 (1960)).

In fact, many courts have adopted interpretations of retaliation provisions in employment statutes, including Title VII, outside the literal terms of the statute in order to effectuate Congress's purpose of forbidding retaliatory activity. Ohio Edison, 7 F. 3d at 545. See e.g., Sauers v. Salt Lake County, 1 F.3d 1122, 1128 (10th Cir. 1993) (action taken against an individual in anticipation of that person engaging in protected opposition to discrimination constitutes retaliatory discharge in violation of 42 U.S.C. § 2000e-3(a)). Passer v. American Chemical Soc'y, 290 U.S. App. D.C. 156, 935 F.2d 322, 330 (D.C. Cir. 1991) (former employee could maintain an action under the ADEA's anti-retaliation provision); NLRB v. Retail Store Employees Union, Local 876, 570 F.2d 586, 590 (6th Cir.), cert. denied, 439 U.S. 819, 58 L. Ed. 2d 109, 99 S. Ct. 81 (1978) (anti-retaliation provision of the National Labor Relations Act prohibited an employer from firing an employee who refused to testify at a Board hearing despite the fact that the statute, by its terms, applied only to employees who had "filed charges or given testimony," and did not addresses a refusal to give testimony).

The court finds that under this line of thought the phrase in

§ 2000e-3(a), "because he has opposed any practice made an unlawful employment practice under this subchapter," should be broadly construed to include a claim based upon an action taken against an employee because of an employer's belief that the employee engaged in opposition to sexual harassment. This action is no less retaliatory under the statute than an action taken because an employee actually engaged in protected opposition. In light of the purpose of § 2000e-3(a) — to encourage persons to freely exercise their protected rights under Title VII by preventing the fear of retaliation — the court finds that this form of retaliation falls within the scope of 42 U.S.C. § 2000e-3(a).

If plaintiff intentionally and maliciously filed baseless charges against her supervisors as defendant argues, Title VII would not have prevented defendant from terminating plaintiff. Plaintiff has, however, presented evidence to this court indicating that her supervisors may have engaged in sexually harassing behavior.[6]

Because a genuine issue of fact exists as to whether plaintiff intentionally and maliciously filed baseless charges of sexual harassment against her supervisors as defendant argues, this court cannot rule as a matter of law that plaintiff has failed to prove a prima facie case of retaliatory discharge. When plaintiff's evidence is viewed in a light most favorable to her, as this court must do on summary judgment, a reasonable fact finder could conclude that plaintiff reasonably believed that she challenged conduct which violated Title VII and that she was terminated for her opposition. See Holland, 883 F.2d at 1314-15. Therefore, defendant's motion for summary judgment is denied as to Count I.

---

6. See Ortiz Affidavit, PP 5-16 and Robles Affidavit, P 5.

II. ADEA Claim

Plaintiff also alleges that she was fired because of her age. For plaintiff to successfully prove an ADEA violation, she must first establish that "but for" the defendant's motive to discriminate against her because of her age, she would not have been discharged. Konowitz v. Schnadig Corp., 965 F.2d 230, 232 (7th Cir. 1992). Plaintiff may prove age discrimination by either of two methods. She may present direct evidence that her age was the determining factor in her discharge, or she may employ the burden-shifting method of proof set forth by the United States Supreme Court for Title VII cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), later extended by the Seventh Circuit to ADEA cases. See McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 371 (7th Cir. 1992) (quoting Oxman v. WLS-TV, 846 F.2d 448, 452 (7th Cir. 1988)).

Under the burden-shifting method of proof (the method used by plaintiff in this case), plaintiff may establish a prima facie case of discrimination by showing that she was:

> (1) within a protected class (age 40 or older); (2) performing her job according to her employer's legitimate expectations; (3) the subject of a materially adverse employment action; and (4) treated less favorably than younger employees.[7]

---

7. The Seventh Circuit in Kralman v. Illinois Dept. of Veterans' Affairs No. 93-3398, slip op. at 10 (7th Cir. April 20, 1994), rejected a bright-line test that in order to establish a prima facie case of age discrimination the plaintiff was required to show that plaintiff was replaced by a person outside

(Cont'd)

Robinson v. PPG Indus., Inc., No. 92-3000, slip op. at 6 (7th Cir. May 4, 1994) (citations omitted).

"If the plaintiff succeeds in establishing a prima facie case, this creates a rebuttable presumption of discrimination, and the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employee's discharge." Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122 (7th Cir. 1994). Once the employer has articulated nondiscriminatory reasons for plaintiff's discharge, the burden shifts back to the employee to show that the employer's reasons are merely a pretext for age discrimination. Id. (citing Weihaupt v. American Medical Ass'n, 874 F.2d 419, 426-27 (7th Cir. 1989)).

To establish that defendant's justification is a pretext, plaintiff must show: 1) that a discriminatory reason more likely motivated the employer; or 2) that the employer's reasons are unworthy of credence. See Anderson v. Stauffer Chem. Co., 965 F.2d 397, 402 (7th Cir. 1992). Plaintiff may demonstrate that defendant's reasons are unworthy of credence in any of three ways: (1) by showing that the reasons have no basis in fact; (2) by showing that the reasons did not actually motivate plaintiff's discharge; or (3) by showing that the reasons were insufficient grounds for plaintiff's discharge. Weihaupt, 874 F.2d at 428.

In this case, plaintiff has chosen to prove her ADEA claim

(Cont'd)
of the protected class. The court recognized, however, "that there may be some circumstances in which a court may find that the difference in ages between the plaintiff and the favored employee are not sufficient to create a reasonable inference of age discrimination." Id.

under the burden-shifting method. Because this court finds defendant's reasons for plaintiff's discharge not to be a pretext for age discrimination, plaintiff's establishment of a prima facie case as to her discharge is inconsequential. The evidence in this case clearly shows that plaintiff was first suspended and later discharged because the defendant believed that she had intentionally and maliciously filed baseless charges against her supervisors and plaintiff refused to admit that she had falsely accused her supervisors of sexual harassment. Plaintiff does not dispute this evidence, but in fact relies on it as a basis for her retaliatory discharge claim.

Plaintiff has offered no evidence indicating that plaintiff's age was a factor in her termination. The evidence clearly shows that two other younger employees (one in her early forties and the other in his late twenties) accused of the same conduct were merely suspended and demoted instead of being terminated because, unlike plaintiff, they acknowledged their involvement in writing the letters accusing their supervisors of sexual harassment and affirmed their loyalty to the company.[8] The court therefore finds that the defendant is entitled to summary judgment in its favor on Count II of plaintiff's complaint because plaintiff has not presented sufficient evidence to this court which suggests that age was a factor in her discharge or which shows that defendant's reasons for plaintiff's discharge were a pretext for age discrimination.

CONCLUSION

For the reasons stated above, defendant's motion for summary judgment is DENIED as to Count I and GRANTED

---

8. See Statement of Undisputed Material Facts, PP 82 - 85.

as to Count II. Defendant's motion to strike is MOOT. The parties are strongly urged to discuss the settlement of this case and report on the status thereof on June 27, 1994 at 10 a.m.

ENTER:

JAMES F. HOLDERMAN

United States District Judge

DATED: May 26, 1994